PATNA HIGH COURT

Governor-General of India in Council

Vs

Bibi Saliman

(Ramaswami, J.)

21.01.1948

JUDGMENT

Ramaswami, J.

1. In the suit which is subject of this appeal the plaintiff claimed damages from the Government on the ground that her son Ghulam Rasool aged 18 years was killed in the Kiul station yard by a pilot engine which was negligently driven. The defendant resisted the claim on the ground that there was no negligence on the part of the shunter, that Ghulam Rasool had trespassed on the railway and he was killed on account of his own negligent act. The defendant declared that on the alleged date Ghulam Rosool was found dead on the railway line and from enquiry the defendant learnt that the accident was caused not by the pilot engine but probably by another train 66 Down which had just reached the platform. The trial Judge, however, found that the deceased Ghulam Rasool was not a trespasser but a licensee, that his death was caused by the negligent driving of the pilot engine. The trial Judge granted a decree for a sum of ₹ 4500 in favor of the plaintiff.

2. Against this decree the defendant has instituted this appeal.

3. Two arguments were presented on behalf of the appellant.

4. In the first place learned advocate contended that the death of Ghulam Rasool was not caused by the pilot engine as alleged by the plaintiff. He maintained that Ghulam Rasool was run over by another train, possibly 66 Down, shortly before the pilot engine drove over the line. In the alternative, it was argued that the plaintiff's evidence even if accepted as true did not constitute sufficient proof of negligence on the part of the defendant.

5 In the second place it was argued that Ghulam Rasool himself was negligent in trespassing over the railway line and there was no proof that the negligence of the defendant (if any) was the effective or the predominant cause of the accident.

6. At the outset we should state that this is an unfortunate case and we entertain sympathy for the plaintiff over her loss. But we must be careful not to allow our sympathy to affect our judgment for, as observed by Farewell L.J. "sentiment is a dangerous will of the wisp to take as a guide in the search for legal principles": *Latham v. Johnson*[1]

7. In the present case the cause of action is founded on negligence. The charge against the defendant is that the gunner caused the death of Ghulam Rasool by negligent driving of the engine. But what is negligence? Negligence as a tort is the breach of a legal duty to take care. As stated by Alderson B. negligence is an omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and a reasonable man would not do: *Blyth v. Birmingham Waterworks Co*[2]. Before the plaintiff succeeds in the present action, therefore, she has to prove that the defendant railway administration in having the engine driven at the particular time and place and circumstance was guilty of negligence and that such negligence was the effective cause of the death of Ghulam Rasool.

8. According to P.W. 1 the pilot engine did not whistle and it was proceeding fast at about 30 miles speed. P.W. 1 stated that he saw the deceased boy being knocked down by the pilot engine while crossing the line. P.W. 1 admitted that he was not examined before the police. When cross-examined he conceded that he could not say which engine was whistling and which engine was not at the time of the accident. P.W. 3 Ram Lal has given similar evidence. He stated that the boy was run down by the pilot engine which did not whistle and which was going fast. The trial Judge held that the engine was running at the speed 10 or 15 miles. He accepted the evidence of D.W. 3 that the engine moved after whistling but he held that since there was no proof of constant whistling the driver of the engine was negligent. It is very difficult to hold that P.W. 1 has given reliable evidence. But even accepting the findings there is no proof that the driving of the engine at 10 or 15 miles an hour or that the absence of constant whistling was the effective cause of the death of Ghulam Rasool.

9. On the contrary the defendant adduced evidence to show that it was not the pilot engine but some other train which had run over the deceased shortly before the pilot engine drove over the place of accident. D.W. 1 deposed that the pilot engine was proceeding from west to east and there was a waggon attached to the engine. D.W. 5 Binda Prasad, the gunner, stated that the engine was moving slowly and started after whistling. He stated that he saw a dead body from a distance of 10 steps and before he could stop the engine, it had passed the body. The body itself was lying within the two lines of line No. 4, the head was to the south of the line. At that time the train 66 Down was standing in the same line about 50 steps from the corpse. The Assistant Station Master (p.w. 7) deposed that after the accident he examined the wheels of the pilot engine but found no trace of blood or other marks of accident. The trial Judge has disbelieved the defence evidence but he has not given adequate reasons to do so. On the other hand, the defence evidence is supported by Ex. A, the report of the Station Master which was despatched soon after

the accident had taken place. In Ex. A there is mention that the boy had been run over on No. 4 line, that the accident was suspected to have been caused by 66 Down passenger train. On the same date the gunner made a statement to the Station Master that he had found the corpse on the line, that the boy had been run over by the 66 Down. In my opinion the defence evidence that the boy was run over by 66 Down is more probable.
10. But assuming that the plaintiff's evidence is true there is still no proof that the alleged negligent acts, namely, the absence of continuous whistling and the running of the engine at the rate of 10 or 15 miles an hour effectively contributed to the accident.

11. In this context it is necessary to discuss the plea of the defendant that there was contributory negligence on the part of the deceased Ghulam Rasool. The theory of the contributory negligence is no special branch of the law. It is only a different aspect of the main question to be determined in the case, namely, "What is the effective or predominant cause of the accident". In *Wakelin v. L. and S.W. Rly*[3]. Lord Halsbury appears to have favoured the view that the doctrine was based on the principle "in pari delicto potior est conditio defendentis". But this theory does not appear to be adequate and in subsequent cases the doctrine has been explained on the principle of causation or remoteness of damage. The plaintiff cannot recover if his own negligence was the decisive cause of the harm which he has suffered: *Butterfield v. Forrester*[4]

12. If, however, the defendant's negligence was the cause of the accident, the plaintiff can recover in spite of his own negligence. This principle is illustrated by the decision of House of Lords in *Radley v. L. & N.W. Rly*[5]. In that case the plaintiffs owned a railway Biding with a bridge eight feet high over it. They negligently left on the siding a truck with a disabled truck piled upon it so that the joint height of the two amounted to eleven feet. The defendants' engine driver was shunting a long line of trucks on the siding. He felt some obstruction, and instead of trying to ascertain what it was, put on steam. The obstruction was due to the fact that the piled-up truck had come to contact with the bridge and, being three feet too high for the span of it, could not pass under it. The extra impetus broke down the bridge. A new trial was ordered because the Judge had wrongly directed the jury that the plaintiff must satisfy them that the accident had happened solely through the negligence of the defendant's servants.

13. In the present case there is no evidence that the defendant's negligence was the effective cause of the accident. Assuming but without deciding that the engine was being driven at 10 or 15 miles an hour and there was absence of constant whistling, it does not necessarily follow that these negligent acts were the sole or decisive reasons for the accident. In *Wakelin v. L. & S.W. Rly*[6]. the dead body of a man was found on a railway line near a level crossing at night. He had been killed by a train which carried the usual head-lights but did not whistle or otherwise give warning of its approach. The level crossing was guarded by hand-gates. No evidence was given as to how the deceased had on the line. In an action under the Fatal Accidents Act, 1846, the House of Lords held that even assuming that there was evidence of negligence on the defendants' part, yet there was no evidence to connect such negligence with the accident, and that there was

no case to go to the jury. It was pointed out (1) that the deceased must have been taken to know that if he remained on a line where trains run at high speed, he was bound to be run over; and (2) unless he were blind or deaf, the noise and glare of the approaching train gave him ample warning of its approach.

14. In the present case it was incumbent on the plaintiff to establish by proof that her son's death could be attributed to some negligent act or some negligent omission on the part of the defendant. If that fact is not proved the plaintiff fails. If in the absence of direct proof the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendants, the plaintiff again fails, for the very simple reason that the plaintiff is bound to establish the affirmative of the proposition; "Ei qui affirmat non ei qui negat incumbit probatio". It the evidence establishes only that the accident was possibly due to the negligence to which the plaintiffs seek to assign it, their case is not proved. To justify the verdict which they have obtained the evidence must be such that the attribution of the accident to that cause may reasonably be inferred. If a case such as this is left in the position that nothing has been proved to render more probable any one of two or more theories of the accident, then the plaintiff has failed to discharge the burden of proof incumbent upon him. He has left the case in equilibrium, and the Court is not entitled to incline the balance one way or the other (Lord Macmillan in *Jones v. G.W. Rly. Co*[7]

. 15. In the present ease there is no evidence that the alleged negligence on the part of the defendant was the decisive cause of the death of Ghulam Rasool.

16. There is another aspect of this case which requires to be examined. Assuming that there was no negligence, can the defendant be liable in tort on ground that there was "strict liability" of the railway administration as owner or occupier of dangerous premises?

17. To determine this question, it should be first considered whether the plaintiff was at the time and place a trespasser or a licensee. The trial Judge held that Ghulam Rasool was a licensee but the evidence in this case does not support this inference. D.W. 3 Mr. Varma deposed that there were eight lines in Kiul yard and there was also a turn table line. The inspection note of the Subordinate Judge also shows that there is a subway between these eight lines for persons going from the North to the platform on the passenger shed. Mr. Varma deposed that passengers were not permitted to cross the line. The pilot engine worked for the whole 24 hours in attaching and detaching waggons and in marshalling in yards. There were notices on subways and also on the platform that passengers should not cross the railway line. P.W. 3 Ram Lal also admitted that for going from north to south one could go easily by the subway. The witness stated the Station Master had beaten several persons for not going by the subway. The evidence therefore leaves no room for doubt that Ghulam Rasool was a trespasser.

18. The question arises what is the liability in tort of the occupier of dangerous premises or structure with respect to a trespasser who enters it. In *Robert Addie and Sons (Collieries) v.*

Dumlreck[8] Lord Hailsham laid down that towards a trespasser an occupier has no duty to take reasonable care for his protection or even to protect him from concealed dangers. Lord Hailsham observed that a trespasser came on to the premises at his own risk; that an occupier was in such a case liable only when injuries were due to some wilful act involving something more than the absence of a reasonable care. In this case a boy aged 4 years was killed by being crushed in the terminal wheel of a haulage system belonging to a colliery company. The wheel was dangerous and attractive to children and was in an inadequately fenced field which the company knew to be used by the children as a play-ground. The company's officials at times warned the children out of the field but their warnings were disregarded. At the time of the accident the employees who set the wheel in motion were at such a distance from it and in such a position that the wheel was invisible to them. The House of Lords held that the child was a trespasser and the company was not liable for his death. The ratio of the case is that a trespasser cannot recover damages unless the danger was put there expressly to injure him or there was some wilful act involving something more than the absence of reasonable care.

19. In my opinion, the plaintiff in the present case must fail whether her action was based on negligence or on the more strict liability of the owner of the dangerous premises.

20. I would allow this appeal and direct that the plaintiff's suit should be dismissed. In the circumstance the parties will bear their own costs.

21. We have absolved the railway administration from all legal liability for this accident. But we hope that the administration would ex gratia make compensation to the plaintiff. In *Stiefsohn v. Brookebond & Co*[9]. the counsel on behalf of the defendant company stated that irrespective of the decision of the Court the defendants would compensate the child for the injuries sustained, and we trust the learned Counsel in this case for the railway administration would be in a position to make a similar announcement.

22. I consider that the appropriate compensation will be about ₹ 1000.

Manohar Lall J.

I agree.

23. Having anxiously perused the evidence in the case it is difficult to find wherein the negligence of the railway administration was in connection with this unfortunate accident which resulted in the death of the young boy, Ghulam Rasool. There is no reliable evidence as to the manner in which the accident took place--all that the evidence establishes is that the boy was run over by a shunting engine. I am not satisfied that the evidence also establishes that the engine was running ten to fifteen miles an hour. On the other hand, the evidence suggests that the engine must have been moving slowly as it had to attach and detach a bogie from the 66 Down train. If the engine had been running at a high speed, it would certainly have resulted in a serious

collision with the standing train. I also do not find any sufficient evidence to justify the conclusion of the Subordinate Judge that the engine should have been constantly blowing a whistle. The boy was trespassing across the railway line and unless the driver saw the boy running in front of the engine, he could not be expected to blow the whistle, far less constantly. The matter would have been different if a large number of passengers had deliberately rushed to the platform attached to the line whereon the engine was running, then it would certainly have been the duty of the engine-driver to blow whistle constantly, but, there is no evidence to that effect.

24. In my opinion, the learned Subordinate Judge was carried away by his undoubted sympathy for the plaintiff--we ourselves are fully sympathetic to the lady--but the casa must be decided upon legal evidence. Cases of this type do not arise frequently in the mofussil Indian Courts, and it is not surprising that the learned Subordinate Judge has committed an error of law in his approach as to how the casa should be decided. My learned brother has exhaustively reviewed the leading authorities on the point, and the civil Courts should peruse the judgment of my learned brother so that they may grasp the legal position of such cases. For these reasons, I agree that the appeal must be allowed and the suit of the plaintiff should be dismissed.

25. I endorse the recommendation of my learned brother that in this case the railway administration should be generous enough to make a reasonable compensation to the plaintiff. I would suggest the amount of compensation to be any figure between ₹ 1000 and ₹ 2000.

Cases Referred.

1(1918) 1 K.B. 898
2(1856) 11 Ex. 781
3(1886) 12 A.C. 41
4(1809) 11 East 60
5(1876) A.C. 754
6(1886) A.C. 41
7(1931) 144 L.T. 194
8(1929) A.C. 858
9(1889) 5 T.L.R. 684